



Department of Land Conservation and Development

1175 COURT STREET NE, SALEM, OREGON 97310-0590 PHONE (503) 378-4926

September 25, 1987

TO: Land Conservation and Development Commission

FROM: James F. Ross, Director *JFR*

RE: Proposed Amendment to Division 4, "Interpretation of Goal 2 Exception Process"

SUBJECT: OAR 660-04-010(1)(b): Application of the Goal 2 Exception Process to Goal 4 "Forest Lands"

Summary Recommendation

Amend the exceptions rule by deleting from OAR 660-04-010(1)(b) the phrase "however, an exception to Goal 4, Forest Lands, is not required for farm uses allowed under ORS 215.203."

Background

The Department proposes that an amendment be made to OAR 660-04-010(1)(b). This amendment is intended to redirect LUBA to consider the Commission's policy regarding the siting of certain nonforest uses on forest lands without requiring an "exception" to Goal 4. An amendment is necessary because in Jensen v. Clatsop County and Bayview Transit (LUBA No. 86-025) LUBA indicated that a Goal 4 exception is required to allow certain nonforest uses, such as aggregate extraction, on forest land.

The basis for LUBA's decision in Jensen v. Clatsop County and Bayview Transit, is found in OAR 660-04-010(1). This provision of the exceptions rule reads as follows:

"... The exceptions process is generally applicable to all or part of those statewide goals which prescribe or restrict certain uses of resource land. These statewide goals include but are not limited to:

(b) Goal 4 'Forest Lands,' however, an exception to Goal 4 'Forest Lands' is not required for farm uses allowed under ORS 215.203."

In Jensen v. Clatsop County, LUBA reasoned that its previous ruling in SEPA v. Washington County, which specified the circumstances surrounding the approval of a nonforest use on land designated for forest uses, no longer held. Instead they relied on language in OAR 660-04-010(1)(b) to interpret that all nonforest uses except "farm uses" described in ORS 215.203 are required to take an exception to Goal 4 before such nonforest uses can be sited on forest lands. About OAR 660-04-010(1)(b), LUBA states:

"This rule does not eliminate the need for an exception to Goal 4 to accommodate nonfarm uses described in ORS 215.213 (now ORS 215.283). We follow the agency's current rule rather than the earlier statement in SEPA.

An exception from Goal 4 is required for nonfarm or nonforest uses on forest lands..."
(14 Or LUBA 776, 779)

However, by the adoption of OAR 660-04-010(1)(b) the Commission never intended to exclude all nonforest uses from locating on forest lands. It is clear from numerous acknowledgment reports that LUBA's interpretation in Jensen does not reflect Commission policy.

Commission Policy

The Commission has repeatedly indicated through acknowledgment reviews that certain nonforest uses and activities with limited impacts may be allowed in forested areas, provided such uses satisfy review and siting criteria designed to minimize adverse impacts on forest lands. In the Coos County Acknowledgment Review dated November 16, 1983, the Commission indicated that a number of nonforest uses could be located in "primary" forest areas provided the following review criteria are satisfied:

- (1) That the proposed use will not significantly impact forest uses on adjacent and nearby forest lands;
- (2) That the proposed use will not significantly increase the costs of forest management on adjacent and nearby forest lands;
- (3) That the site is limited in size to that area suitable and appropriate only for the needs of the proposed use;
- (4) That, where necessary, measures are taken to minimize potential negative impacts on adjacent and nearby forest lands;

- (5) That the proposed use is consistent with the forest policies contained in the comprehensive plan; and
- (6) That one of the following criteria are met:
 - (A) For necessary uses (such as power lines where the application of the "generally unsuitable" standard would be an impractical requirement)--evidence is provided supporting reasons why the proposed use should be sited on forest lands; or
 - (B) For other desired uses--that the proposed site is on land generally unsuitable for forest uses.

Uses identified by the Commission, as appropriate in primary forested areas pursuant to the preceding review criteria, include aggregate and mineral mining, communication facilities, low level power lines, small solid waste disposal sites, small reservoirs, and campgrounds.

For mixed agriculture/forest and small woodlot forested areas, the Commission has indicated that a number of nonforest uses, including those nonfarm uses allowed by ORS 215.283(1) and (2), may be authorized provided minimal review criteria are addressed. In the Coos County review, the Commission suggested that the following review criteria be employed:

- (1) The proposed use is compatible with and will not significantly affect existing forest uses on the site or surrounding land;
- (2) The proposed use will not interfere with operations and practices;
- (3) The proposed use will not alter the stability of the overall land use pattern in the area; and
- (4) The proposed use is consistent with forest policies in the comprehensive plan and the purposes of the zone.

Contrast Between EFU and Forest Zones

Goal 3, Agriculture Lands, establishes the exclusive farm use (EFU) zone as the means to implement the policies to protect agriculture lands. The EFU zone, which was established by the legislature under ORS Chapter 215, permits, either outright or conditionally, a number of farm-related and nonfarm uses. Also, for all such uses, except nonfarm dwellings, no review or siting

criteria are provided. Thus, for conditional uses authorized by ORS 215.283(2), jurisdictions are left to decide the criteria to employ, if any, during a review to allow a nonfarm use.

ORS 215.283 permits counties to allow outright schools, churches, forestry, utility facilities and farm-related dwellings. Also, the statute permits, subject to review, mining of minerals and aggregate, parks and playgrounds, golf courses, solid waste sites, commercial utility facilities, commercial activities in conjunction with farm use, dog kennels and personal use airports among other uses.

On the other hand, Goal 4, Forest Lands, does not indicate how forest lands are to be conserved for forest uses. The number and types of forest zones, as well as the types of forest-related and nonforest uses, were established through their adoption by counties. Through acknowledgment reviews, the Commission affirmed its policy regarding uses and activities that are appropriately located within forested areas.

Proposed Amendment to OAR 660-04-010(1)(b)

The Department proposes that OAR 660-04-010(1)(b) be amended to be consistent with the Commission's Policy of allowing certain nonforest uses on forest lands without requiring an exception to Goal 4. The adoption of this amendment will be an interim remedy. A comprehensive revision to the Goal 4 rule addressing the question of which nonforest uses can be allowed and under what circumstances will be necessary as part of the "Secondary Lands" rule making exercise. However, by deleting at this time, the statement in OAR 660-04-010(1)(b) indicating that farm uses are allowed on forest lands without an exception to Goal 4, a couple of concerns would be addressed.

First, LUBA's erroneous interpretation in Jensen, indicating that the Commission intended to exempt only farm uses from the Goal 4 exception requirement while requiring all of other nonforest uses to satisfy the exceptions test, would become moot.

Second, LUBA would be obligated to rely on previous legal decisions (e.g., SEPA and 1000 Friends v. Benton County, 72 Or App 443 (85)) and the Commission's acknowledgment reviews as the basis for interpreting Commission policy regarding the suitability of locating certain nonforest uses on forest lands.

Proposed Amendment to OAR 660-04-010(1)(b)

The Department proposes that OAR 660-04-010(1)(b) be amended by deleting the language in brackets. Thus, OAR 660-04-010(1) in conjunction with Subsection (b) will read as follows:

"The exceptions process is not applicable to Statewide Goal 1, Citizen Involvement, and Goal 2, Land Use Planning. The exceptions process is generally

applicable to all or part of those statewide goals which prescribe or restrict certain uses of resource land. These statewide goals include but are not limited to:

(b) Goal 4 "Forest Lands" [, however, an exception to Goal 4 "Forest Lands" is not required for farm uses allowed under ORS 215.203].

MJR

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NOTICE OF PROPOSED RULEMAKING HEARING

AGENCY: Land Conservation and Development Commission

The above named agency gives notice of hearing.

HEARING(S) TO BE HELD:

Date: _____ **Time:** _____ **Location:** _____

October 22, 1987 8:30 a.m. Hearing Room E, State Capitol Bldg., Salem, Oregon 97310

*A copy of the proposed rule will be mailed on or about September 25, 1987 to the agency's mailing list. Comments received by the Department by Monday, October 12, 1987 will be provided to the Commission one week prior to the meeting.

Hearings Officer(s): Land Conservation and Development Commission

Pursuant to the statutory authority of ORS Chapters 197 and 183, particularly ORS 197.040(1)(b) and 197.732.

the following action is proposed:

ADOPT: _____

AMEND: OAD 660-04-010(1)(b)

REPEAL: _____

SUMMARY: This amendment will clarify the Commission's policy on allowing certain nonforest uses on forest lands without requiring an exception to Goal 4.

Interested persons may comment on the proposed rules orally or in writing at the hearing. Written comments received by October 22, 1987 will also be considered. Written comments should be sent to and copies of the proposed rulemaking may be obtained from:

AGENCY: Dept. of Land Conservation and Development

ADDRESS: 1175 Court Street NE
Salem, Oregon 97310

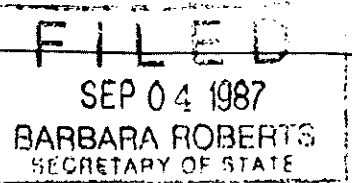
ATTN: Mike Rupp

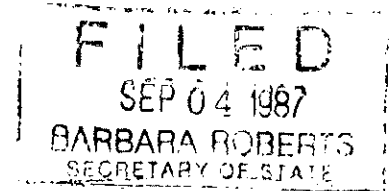
PHONE: 373-0095

Signature

Date

9/4/87





ADOPTION OF AMENDED RULE

OAR 660--DIVISION 4
"Interpretation of Goal 2 Exceptions Process"

Statement of Need

This administrative rule amendment is needed to clarify which nonforest uses and under what conditions such uses can be allowed on forestlands without an exception to Goal 4. Currently, OAR 660-04-010(1)(b) indicates that farm uses, as defined by ORS 215.203, are the only nonforest uses allowed under Goal 4 without taking an exception. (See Jensen v. Clatsop County, 14 Or LUBA 776 (1986). Without this amendment, every forest zone, acknowledged under ORS 197.251, would be in violation of OAR 660-04-010(1)(b).

Principal Documents Relied Upon

1. ORS Chapters 197, 183, and 215
2. OAR 660, Division 1, Procedural Rules including Model Rules of Procedures
3. Statewide Goal 4
4. OAR 660, Division 4, "Interpretation of Goal 2 Exception Process"
5. Jensen v. Clatsop County, 14 Or LUBA 776 (1986)

Fiscal Impact

Amendment of OAR 660-04-010(1)(b) will avoid a significant negative fiscal impact on Oregon counties with forest zones. Without this amendment, each county will be required to amend its forest zones at considerable expense. Until such amendments are made, a county will be required, again at considerable expense, to take an exception to Goal 4 and amend its comprehensive plan before the approval of any nonforest uses currently authorized under its acknowledged forest zones. The rule amendment will eliminate a conflict between acknowledged plans and existing case law and avoid future confusion and costly litigation.

RE:sp

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